No. 83-672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FREDERICK E. ALTHISER, *et al.*,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT*

Petitioners are individual white

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*/ We have included this brief description of the facts and the proceedings

corrections officers who were permitted to intervene in a suit brought by Edward Kirkland and other minority corrections officers challenging the selection procedures used to promote officers from the rank of sergeant to lieutenant.

Promotion to lieutenant is accomplished through appointment from a list of eligibles. The list of concern in this case was based on the results of an examination administered in October 3, 1981. Of the approximately 739 candidates who took that test, 570 were white and 169 were minority. Of this number 527 white and 148 minority officers passed (App.

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below, because of the many inaccuracies and misleading statements contained in the petition.

9c).[1] Contrary to petitioners' assertion (pet. at 3), disproportionate impact existed even at the pass-fail level.[2]

Based on the examination results, the eligibles were ranked according to their scores, adjusted for seniority and veteran's credits, if applicable.[3] The effect of the list's rank-ordering was to maximize the disparate racial impact of the examination (App. 5a n.3).

On the first round of promotions based on this list, the New York State Department of Correctional Services ("DOCS") made 171

1/ Reference is to the pages of appendices that follow the petition.

2/ See Affidavit of Dr. James L. Outtz, dated October 15, 1982, paragraph 10. This affidavit contained expert testimony, offered by the plaintiffs below and admitted by the district court, demonstrating the adverse impact and lack of job-relatedness of the examination.

3/ The addition of these credits did not play a significant role in the resulting disparate impact (App. 5a, 27a).

appointments, of which only 17, or close to 10%, were minority, despite the fact that over 22% of the candidates who sat for the exam were minority. As further appointments were made the percentage of minority appointments decreased: by July 28, 1982, DOCS had made 222 appointments and only 9%, or 20, were minority (App. 6a).

Several months after the filing of the complaint in January 1982, after conducting discovery and holding several negotiation sessions, the parties were able to reach a settlement. The attorney for petitioners participated in the settlement conference with the court and, indeed, indicated that he approved of the outlines of the settlement (App. 2-3e). The settlement had two basic elements: provisions to lessen the adverse impact of the existing selection process and provisions for the development of a new, non-discriminatory selection

procedure. The settlement did not prohibit all use of the examination results, thus appointments already made were not disturbed, and white officers, although alleged by plaintiffs to have been wrongfully promoted at the expense of minority officers who passed the examination, retained their positions and suffered no detriment.

The purpose of the settlement was to provide equal opportunity and eliminate the disadvantage for minorities that resulted from the use of the examination (App. 3f ¶7). In order to diminish the adverse impact resulting from the exam and the list, the settlement modified the rank-ordering of the list, by placing candidates into three zones, based on their final scores (App. 8-9f). All candidates within a given zone were deemed to be of

equal fitness for promotion.[4/] Under the settlement, appointments from within a zone are first offered to minority eligibles until minority appointments reflect the proportion of the eligible pool which is minority, or 21%, of the total appointments. After that point, appointments are to be made in a ratio of one minority to four non-minority[5/] (App. 9f).

4/ Each zone contained candidates whose scores differed by no more than four points (App. 30a). The size of the zones was not arbitrarily chosen but rather, as the appellate court noted, "... was based on a statistical computation of the likely error of measurement inherent in Exam 36-808...."(App. 31a). the parties originally considered a random ranking within each zone; however, the original rankings were retained to satisfy the concerns of the petititoners (see transcript of Sept. 29, 1982 hearing at pp. 29-30, 47-52).

5/ The percentage and ratio are not absolute. If no minority candidate who is within the zone from which selections are being made desires to serve at the facility where there is a vacancy, the appointment is offered to a non-minority candidate, regardless of whether the

However, no minority eligible who falls within a lower zone will be promoted ahead of any candidates, regardless of race, within the highest unexhausted zone (App. 9a).

The court of appeals found zone-scoring an ideal method of accomplishing the settlement's modest purpose, without substantially burdening non-minorities:

> [T]he adjustment was a proper means of compliance with Title VII since, by creating a more valid method to assess the significance of test scores, it eliminated the central cause of the adverse impact, i.e., the rank-ordering system, while assuring promotion on the basis of merit. In fact, the rank-ordering system permissibly could have been modified to produce a result more disadvantageous to [petitioners].... Thus, the creation of a tiered zone system ... may have the least detrimental effect on the

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5/ continued

desired percentage has been reached (App. 9a). In addition, the district court noted the ease with which the modest 21% goal would be met (App. 12c).

> interests of non-minority candidates who obtained high test scores.

App. 31a.

Plaintiffs had made out a prima facie case, by showing that the selection procedure had an adverse impact on minorities (App. 25-27a). While defendants initially sought to defend the use of the test as job-related, they came to recognize that they were unlikely to prevail. In fact, the state had vigorously defended a similar case and lost. See, Kirkland v. New York State Department of Correctional Services, 374 F. Supp. 1361 (S.D.N.Y. 1974), aff'd in part and rev'd in part, 520 F.2d 420 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976), on remand, 482 F. Supp. 1179 (S.D.N.Y.) aff'd, 628 F.2d 796 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981). The outcome of that prior case served as one of the underpinnings of the settlement, i.e., that a written test cannot make the

kind of fine distinctions in candidate qualifications that would justify a rank-ordered list. (App. 30-31a) The petitioners failed to proffer any evidence to support either the validity of the exam or the use of rank-ordering.[6/]

The district court's approval of the settlement came only after all persons who might be affected by the settlement, including petitioners, received notice and were afforded an opportunity to be heard (App. 10a). Petitioners were allowed to intervene for purposes of objecting to the settlement. The district court examined

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6/ Were the state to have unilaterally chosen to use zone scoring in order to derive an eligibility list, petitioners would have no cognizable claim (see App. 18a: state law affords "wide discretion" on modification of procedures" to determine merit and fitness"). The fact that the state initially used rank-ordering and subsequently adopted zone-scoring does not alter the situation.

the settlement to determine whether it was fair and reasonable and then considered the objections raised by the petitioners and rejected them. (App. 27-30c). The only effect of the limitation on the scope of intervention was to prevent petitioners from forcing the state to engage in the futile act of a full trial on the merits (App. 25c). The district court's approval of the settlement was affirmed on appeal, based on the Second Circuit's holding that, after noting the interim nature of the race-conscious promotional procedures, the remedies were "sustantially related to and do not go beyond the goal of eliminating [the exam's] adverse impact" (App. 34a).

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE CONGRESSIONAL POLICY FAVORING VOLUNTARY SETTLEMENT OF TITLE VII SUITS

"Cooperation and voluntary compliance

were selected as the preferred means of achieving [the goal of eliminating discrimination]." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). This Court more recently affirmed that view in Carson v. American Brands, Inc., 450 U.S. 79, n.14 (1981).[7/]

In Carson the Court held that a court's refusal to approve a consent decree was an appealable order, based not only on this Court's view of the importance of voluntary settlements, but also because the effect of such a refusal was to force the parties to the decree to proceed to trial. 450 U.S at 87. Here too, the petitioners sought to force the parties to

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7/ See also Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982); Occidental Life Insurance v. EEOC, 432 U.S. 355, 368 (1977).

assume the costs and uncertainties of litigation.

The court of appeals in the instant case undertook to examine the settlement for reasonableness and to measure the relief obtained by the settlement against the the relief that might have been ordered had the case proceeded to trial (App. 28a). The Second Circuit concluded that the rank-ordering system could have been modified even futher, producing a result "more disadvantageous" to petitioners (App. 31a). The appellate court also recognized that tne settlement did not go as far as it could have, since no backpay was provided and appointments of white officers that had been made were not rescinded (App. 11a). To adopt the position urged by petitioners would sound the death knell for voluntary compliance and Title VII settlements.

II. THE DECISION BELOW IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS

A. The Decision Below is Consistent With the Principles Announced in Bakke and Fullilove

Petitioners imply that the decision below is in conflict with this Court's decisions in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and Fullilove v. Klutznick, 448 U.S. 448 (1980). While they fail to point out any direct conflict between those decisions and the decision below, it is petitioners' contention that a public employer may never enter into a pre-trial settlement that provides a race-conscious remedy, even where the employer is faced with overwhelming evidence of discrimination and the remedy is specifically tailored to the violation alleged. Under the facts in this case, the principles handed down in Bakke

and Fullilove support rather than vitiate the decision below.

The instant case simply does not involve a racial preference without regard for qualifications, as did the university program considered by the Court in Bakke. The zone-scoring remedy in this case was adopted to cure "established inaccuracies in predicting ... performance." 438 U.S. at 306 n.43; see also, n.4, supra. The action taken by courts below, instituting a race-conscious remedy after review of a "well substantiated claim of racial discrimination", is consistent with the teachings of Bakke.[8/]

8/ The Court there reaffirmed the validity of Title VII consent decrees. 438 U.S. at 302 n.41. The parties appropriately took steps that were "reasonably necessary to assure compliance" with federal law. Fullilove v. Klutznik, 448 U.S. at 483.

Plaintiffs below made a considerable statistical showing of disparate impact, and offered evidence through an expert that tended to show the test was not job-related. The facts brought forward by plaintiffs provided a reasonable basis for a settlement, which was then subject to court review. Based on that showing, the district court could, and did, properly infer discrimination (App. 22c), because such disparity, "if otherwise unexplained" was likely to have resulted from "impermissible factors". Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The lack of any evidence that the examination was job related, or that rank-ordering based on the examination was justified, necessitated the implementation of a remedy for what amounted to a violation of Title VII.

B. The Decision Below is Consistent With Those of Other Circuits

Courts have often approved settlements involving governmental employers which mandate race-conscious memedies, even though no findings or admissions of liability have been made. See, e.g., United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981); Moore v. City of San Jose, 615 F.2d 1265 (9th Cir. 1980); Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914 (6th Cir. 1979); United States v. City of Jackson, 519 F.2d 1147, 1150 (5th Cir. 1975); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3rd Cir. 1974). Defendants are under no obligation to seek to rebut plaintiffs' prima facie case. See City of Miami, 664 F.2d at 453. Further, third parties are not entitled to force defendants to mount a defense. See Airline Stewards and Stewardesses Ass'n,

Local 550 v. American Airlines, Inc., 573 F.2d 960, 963-64 (7th Cir. 1978).

III. THIS CASE DOES NOT RAISE QUESTIONS PERTAINING TO SECTION 703(h) NOR DOES IT RAISE ISSUES SIMILAR TO THOSE PRESENTED BY CASES PENDING IN THIS COURT

Contrary to petitioners' argument (pet. at 12), Section 703(h), 42 U.S.C. § 2000(e)(h) (App. 2g), simply does not insulate the results of the selection procedure at issue. Section 703(h) provides, in part that an employer may act upon the results of any professionally developed ability test, but only where the "test, its administration or action upon the results is not designed, intended or used to discriminate ...."

As the Court noted in Connecticut v. Teal, 457 U.S. 440, (1982), this section means that it is only "tests that were job related, [which are] permissible despite

their disparate impact." Id. at 452.[9/]

Nor is the eligibility list the equivalent of a seniority system as petitioners would like to imply (see pet. at 19). Longevity plays virtually no role in the promotional process (App. 5a n.2). The list was not the product of collective bargaining, nor did the list create vested rights (App. 31a).[10/] This is not a case, therefore, in which expectations based upon collectively bargained seniority

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9/ As noted earlier, the district court's judgment was based on more than disparate impact. Supra, nn.2, 4.

10/ Thus, the instant case bears no relationship to the situation presented by Memphis Fire Department v. Stotts, 679 F.2d 541 (5th Cir. 1982), cert. granted, ___ U.S. ___, 88 L.Ed.2d 1331 (1983). Stotts involves the question of whether a district court has the power to prohibit layoffs in accordance with a last-hired, first-fired seniority system, pursuant to an earlier consent decree.

rights must be harmonized with the remedial requirements of Title VII. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). While the court of appeals recognized that petitioners had a right to be heard, the appellate court noted that an interest in protecting the "expectation of promotion pursuant to possibly discriminatory selection procedures" was not the sort of interest that made the consent of the petitioners essential (App. 19a).

Finally, the petitioners urge this Court to grant review so that it can examine an asserted conflict with state law (pet. at 20-24). Since the brief in opposition to be filed on behalf of respondents DOCS will probably address this argument in detail, we simply note that both lower courts have examined this contention and were unpersuaded by this claim.

Further, the Attorney General of the State of New York disagrees with petitioners' interpretation of New York law (App. 6f, ¶ 14; 18-19a; 26c).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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